80-1819

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No.

In the Supreme Court of the United States

October Term, 1980

SWISSVALE AREA SCHOOL DISTRICT, CHURCHILL AREA SCHOOL DISTRICT, TURTLE CREEK AREA SCHOOL DISTRICT, and EDGEWOOD SCHOOL DISTRICT,

Petitioners,

v.

DOROTHY HOOTS, individually and as mother of her children JANELLE HOOTS and JAMIE HOOTS; MRS. ADDRALLACE KNIGHT, individually and as mother and natural guardian of her children RONALD KNIGHT, LORETTA KNIGHT, TERRANCE KNIGHT, MARC KNIGHT and BYRON KNIGHT; BARBARA SMITH, individually and as mother and natural guardian of her children TAWANDA SMITH, TEVELA SMITH, JOSEPH SMITH, WESLEY SMITH AND ERIC SMITH; on behalf of themselves and all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether a United States Court of Appeals has the power to impose a time limitation upon the discretionary functions of a trial judge in a United States District Court by ordering the district court to:

(a) complete all hearings and necessary proceedings on the merits of competing remedial plans in a complex school desegregation case;

(b) decide which school districts may be included within an interdistrict remedy; and

(c) enter an appropriate final order granting plaintiffs relief, such relief to be effective and implemented by fall of 1981

all *within 90 days* of the issuance of the mandate.

2. Whether an order which denied without prejudice a motion presented in the midst of testimony and asking for the immediate rejection of a remedial plan for desegregation then being considered and further demanding the immediate implementation (within 30 days) of another remedial plan about which no testimony had been received, is an appealable order within the meaning of 28 U.S.C. §1292(a)(1).

LIST OF PARTIES

Other parties to the proceeding below in the United States Court of Appeals but not listed in this caption are: Commonwealth of Pennsylvania; Edward X. Hallenberg, President of the Allegheny County Board of School Directors; the Allegheny County Board of School Directors; W. Deming Lewis, Chairman of the Pennsylvania State Board of Education; Michael Sullivan, President of the School District of the Borough of Braddock; the School District of the Borough of Braddock; Andrew Lisyak, President of the School Board of the School District of the Borough of Rankin; the School District of the Borough of Rankin; Leo Campbell, President of the School Board of the School District of the Borough of North Braddock; and the School District of the Borough of North Braddock; the Allegheny Intermediate Board of School Directors and Edward X. Hallenberg, as President of the Allegheny Intermediate Board of School Directors, defendants in the district court and respondents below.

In addition to petitioners, by order of court dated May 16, 1979, the East Allegheny School District, Gateway School District, Steel Valley School District and West Mifflin School District were joined by the district court for remedial purposes and were respondents below.

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In the
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No.

SWISSVALE AREA SCHOOL DISTRICT, CHURCHILL AREA SCHOOL DISTRICT, TURTLE CREEK AREA SCHOOL DISTRICT, and EDGEWOOD SCHOOL DISTRICT,

Petitioners,

v.

DOROTHY HOOTS, individually and as mother of her children JANELLE HOOTS and JAMIE HOOTS; MRS. ADDRALLACE KNIGHT, individually and as mother and natural guardian of her children RONALD KNIGHT, LORETTA KNIGHT, TERRANCE KNIGHT, MARC KNIGHT and BYRON KNIGHT; BARBARA SMITH, individually and as mother and natural guardian of her children TAWANDA SMITH, TEVELA SMITH, JOSEPH SMITH, WESLEY SMITH and ERIC SMITH; on behalf of themselves and all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Swissvale Area School District, Turtle Creek Area School District, Churchill Area School District, and Edgewood School District, the petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this matter on January 26, 1981.

OPINIONS BELOW

The opinions of the courts below directly preceding this petition[1] are as follows:

1. July 30, 1980, Order of United States District Court for the Western District of Pennsylvania; unreported (App. ii).

2. Opinion and Order by three member panel of United States Court of Appeals for the Third Circuit filed January 26, 1981 not yet reported, but reprinted in Appendix as follows:

   (a) Opinion for the Court by Judge Hunter, (App. 3a).

   (b) Concurring Opinion of Judge Higginbotham, (App. 17a).

   (c) Dissenting Opinion of Judge Garth, (App. 32a).

   (d) Opinion and Order to Amend Dissenting Opinion dated February 26, 1981 by Judge Garth, (App. 56a).

3. Order of United States Court of Appeals for Third Circuit dated February 25, 1981 (denying Petition for Rehearing), unpublished (App. 53a).

4. Order of March 5, 1981, of United States District Court for Western District of Pennsylvania; unreported (App. 58a).

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[1] This case has been the subject of four previously published opinions, reported as: *Hoots v. Commonwealth of Pennsylvania,* 334 F.Supp. 820 (W.D. Pa. 1971) (*Hoots I)* (denying defendants' motion to dismiss); *Hoots v. Commonwealth of Pennsylvania,* 359 F.Supp. 807 (W.D. Pa. 1973) *(Hoots II)* (finding *de jure* discrimination in the creation of the General Braddock Area School District); *Hoots v. Commonwealth of Pennsylvania,* 495 F.2d 1095 (3d Cir.), *cert. denied* 419 U.S. 884 (1974) *(Hoots III)* (dismissal of appeals from district court's denial of petitions to intervene); and *Hoots v. Commonwealth of Pennsylvania,* 587 F.2d 1340 (3d Cir. 1978) *(Hoots IV)* (dismissing appeal from district court's order rejecting remedial plan.)

5. Order of March 24, 1981, of United States District Court for Western District of Pennsylvania; unreported (denying motion to alter or amend order of March 5, 1981) (App. 74a).

6. Memorandum Order of April 6, 1981 of United States District Court; unreported (App. 75a).

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit (App. ii) was entered on January 26, 1981. A timely petition for rehearing was denied February 25, 1981 (App. 53a). The jurisdiction of the Supreme Court is involved pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

The question of jurisdiction set forth in paragraph two above, involves 28 U.S.C. §1292(a)(1) which provides as follows:

> "(a) The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, ... or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

A. History

This is a school desegregation case brought pursuant to 42 U.S.C. §1981 and 42 U.S.C. §1983 by a few parents of children attending the public schools in the General Braddock Area School District (hereinafter GBASD) in Allegheny County, Pennsylvania. The original complaint, filed June 9, 1971, in the

United States District Court for the Western District of Pennsylvania, alleged that the adoption of a reorganization plan for school districts in Allegheny County has resulted in the creation of a racially segregated school district, namely, the GBASD.

The GBASD is presently a small district of approximately 2,000 students which, prior to the institution of this action, was served by the three independent school districts of the Boroughs of Rankin, Braddock and North Braddock. In 1968 a Pennsylvania statute compelled the County Board of Education to reorganize and consolidate certain constituent school districts in an effort to and solely for the purpose of providing a more comprehensive system of education through the formulation of larger school districts. After much deliberation, on May 9, 1969, the State Board of Education approved and the Court of Common Pleas of Allegheny County upheld a plan which created the GBASD by consolidation of the three borough school districts and the new district came into being July 1, 1971.[2]

As a result of testimony received at a non-jury trial in December, 1972, the United States District Court, in an Opinion and Order filed May 15, 1973,[3] concluded that the defendants intentionally and knowlingly consolidated the Braddock, North Braddock and Rankin School Districts in such a manner as to create a racially segregated school district in violation of the plaintiffs' 14th Amendment rights. Conse-

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[2]See State Board of Education Adjudication, *Appeals of the School Districts of the Boroughs of Rankin, Braddock and North Braddock* (June 23, 1969) App. 79a and *Appeals of the School Districts of the Boroughs of Rankin, Braddock and North Braddock*, SA 544, 556 and 559 of 1969 (Court of Common Pleas of Allegheny County, Pennsylvania, June 1, 1970) (Opinion) App. 83a.

A more detailed account of the formulation of the General Braddock Area School District may be found in *Hoots II*, 359 F. Supp. 807.

[3]*Id.*

quently, the Commonwealth of Pennsylvania State Board of Education was directed to prepare and submit a comprehensive plan of school desegregation for the GBASD which would be both "educationally sound" and "taking into account the practicalities of the situation". [4]

From 1973 through the present, the district court has held numerous hearings, received lengthy testimony and considered a wide range of remedial proposals.[5] However, none of these proposals have yet been found to satisfactorily eliminate the effects of the allegedly *de jure* acts of segregation and still achieve quality education.

In addition, in the past 7½ years, this litigation has been the subject of several appeals to the United States Court of Appeals for the Third Circuit,[6] two applications for Writ of

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[4] *Id.* at 824-25.

[5] After the collection of data and consideration of various remedial concepts, the first proposed remedial plan was submitted to the district court for approval in September, 1973. Known as "22-W", the plan called for the dissolution of the GBASD and the creation of two new school districts by combination with other surrounding districts. The school districts affected by Plan 22-W, including the petitioners herein were invited to intervene for the *limited* purpose of presenting arguments on the merits of the plan. After extensive hearings, Plan 22-W was formally rejected by the court May 7, 1975. *Hoots v. Commonwealth of Pennsylvania*, No. 71-538 (W.D. Pa., May 7, 1975) (Memorandum and Order).

In September, 1975, a new plan known as "Plan A" was submitted to the court. While Plan A again contemplated the destruction of the GBASD, the plan suggested a more moderate realignment of the GBASD with the surrounding districts. After lengthy testimony, the district court denied approval of Plan A, Nov. 18, 1977. *Hoots v. Commonwealth of Pennsylvania*, No. 71-538 (W.D. Pa., Nov. 18, 1977) (Memorandum and Order).

In addition, as discussed at page 13, *infra*, the district court presently has before it three additional proposals. A "Student Tuition Plan", an "Upgrade Plan" which combines a magnet school concept with mandatory co-mingling of students in surrounding districts, and a consolidation proposal suggesting the merger of GBASD with the petitioners herein.

[6] See, *Supra* note 1, at 2.

Mandamus,[7] and various appeals in the Courts of the Commonwealth of Pennsylvania. Further, the district court has had to concern itself with numerous motions, arguments and briefs raising, among other issues, complex questions regarding the joinder of necessary parties and the joinder of parties for remedial purposes only.

B. Proceedings Giving Rise to this Petition

On February 6, 1979, in an effort to find an appropriate solution and bring this protracted litigation to a successful conclusion, the district court encouraged all counsel to submit a satisfactory desegregation plan which might be acceptable to the plaintiffs, the court and the majority of the school districts which had been joined for remedial purposes.

Although plaintiffs' counsel did not propose any concrete or comprehensive plan in response to this invitation, at this unrecorded conference *"plaintiffs' counsel* provided the Trial Judge and those present with data he had collected which, *inter alia,* detailed with considerable accuracy the size and scope of a very limited plan of interdistrict desegregation (a tuition plan for secondary pupils) which he had been authorized to discuss with the Trial Judge and those present."[8] As a result of plaintiffs' favorable attitude toward a limited tuition plan[9] as well as the observation that such a plan would not only be workable but would enable all students of the GBASD system to achieve

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[7] *Hoots v. Weber,* No. 80-2124 (3d Cir. Sept. 9, 1980); *Hoots v. Weber,* No. 79-1474 (3d Cir. May 2, 1979).

[8] Application for Mandamus, *Hoots v. Weber,* No. 79-1474 (3d Cir. 1979) p. 7.

The Tuition Plan, as outlined by plaintiffs' counsel, called for the closing of the GBASD secondary schools and the tuitioning of those students to eight surrounding districts.

[9] It was counsel for Petitioners belief that the suggestion that the Tuition Plan be limited to secondary students was an implied acceptance by the plaintiffs of a neighborhood school concept for elementary students.

a quality education free from the effects of the segregation pattern now existing, the district court directed the Commonwealth to secure all necessary data to formulate such a plan.

In May of 1980, the final "Student Tuition Plan for the General Braddock Area School District" was submitted to the court.[10] In addition, on May 23, 1980, the defendant Commonwealth of Pennsylvania offered to the court an alternative "Metropolitan Desegration Plan for the General Braddock Area School District" which suggested the merger of General Braddock with the school districts of Swissvale, Edgewood and Turtle Creek. Although the merger plan had not been requested by the court, the plan was submitted solely to give the court an idea of an available alternative to the Tuition Plan. It was submitted merely "because it was an easy thing to do, without really making judgments on whether it was a viable alternative".[11]

Hearings on the merits of the Tuition Plan were held commencing July 14, 1980 and concluding August 27, 1980 (despite plaintiffs' intervening appeal of August 4, 1980).[12] In direct contrast to their prior submission and espousement of the Tuition Plan for the previous 1½ years, however, the plaintiffs suddenly opposed the Tuition Plan throughout the July-August 1980 hearings and attempted to direct their testimony toward the debasement of the Tuition Plan.[13] In addi-

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[10]On Sept. 12, 1979, the Commonwealth filed a document setting forth an outline of a nine-district Tuition Plan and in April of 1980, an interim report of the plan was produced. The final plan was submitted on May 15, 1980 and supplemented on May 23, 1980.

[11]July 18, 1980, Transcript, *Hoots v. Commonwealth of Pennsylvania*, No. 71-538 (W.D. Pa.) p. 4.

[12]See, *infra* at 8.

[13]Counsel for Petitioners believe this abrupt change of position by the plaintiffs, occurring relatively simultaneously with the appearance of new counsel has raised a serious question as to the adequacy of representation of the class interests.

tion, the plaintiffs continually attempted to present testimony favorable to merger or consolidation relief despite the trial court's admonishments to restrict all testimony to the merits of only the Tuition Plan.[14]

Then on July 24 and July 30, 1980, upon conclusion of their own testimony but prior to the hearing of any testimony by the affected school districts, the plaintiffs asked the trial court to summarily reject the Tuition Plan in the midst of testimony and to grant an injunction ordering immediate inter-district consolidation relief about which no testimony had been received. The trial judge denied these motions without prejudice to their renewal at the conclusion of the hearings on the Tuition Plan.

Upon denial of the July 24 and July 30, 1980 motions, on August 4, 1980, plaintiffs filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit and on August 11, 1980, plaintiffs further filed an Application for Writ of Mandamus challenging the trial court's delay in the implementation of the requested relief. Said Application was denied by the court September 9, 1980.[15]

By opinion and order of January 26, 1981, the court of appeals, while expressing no disagreement with the trial court's July 24 and July 30, 1980 rulings, accepted jurisdiction of plaintiffs' appeal and ordered the district court to:

"1) complete all hearings and necessary proceedings on the merits of the competing remedial plans for the desegregation of GBASD;

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[14]See *Hoots v. Commonwealth of Pennsylvania,* No. 80-2116 (3d Cir. Jan. 26, 1981) *(Hoots V)* (App. 9a n.15).

Although the hearings were not intended to test the merits of any merger plan (including the Metropolitan Plan), on July 18, 1980, the plaintiffs' own expert witness (in an effort to destroy the Tuition Plan about which he was testifying) stated that the Metropolitan or similar merger plan would be defective. July 18, 1980, Transcript, *Hoots v. Commonwealth of Pennsylvania,* No. 71-538 (W.D. Pa.) p. 250.

[15]*Hoots v. Weber,* No. 80-2124 (3d Cir. Sept. 9, 1980).

2) decide the *Milliken v. Bradley* issue of which school districts may be included within an interdistrict remedy; and

3) enter an appropriate final order granting appellants the relief to which they are entitled under the district court's order of May 15, 1973, such relief to be effective and implemented by the beginning of the first semester of the school year in the fall of 1981."

all within 90 days of the issuance of the mandate on January 26, 1981.[16]

Believing that the three member panel acted improperly and without legal authority in imposing such a mandate, Petitioners herein filed a timely Petition for Rehearing with the court below challenging both that court's jurisdiction and the authority of a court of appeals to impose the 90-day limitation. Said Petition for Rehearing was denied by order of court on February 25, 1981.[17] Hence, this Petition.

REASONS FOR GRANTING THE WRIT

I

Certiorari should be granted to resolve a question of exceptional importance to the federal judiciary which calls for the exercise of this court's supervisory powers, to-wit, the power of a United States Court of Appeals to impose a time limitation upon a district court in its taking of evidence, consideration of issues, and determination of relief.

The prime reason for granting certiorari in this case is to finally test the unprecedented interference by a circuit court upon the discretionary functions of a trial judge and the consti-

[16] *Hoots V* (App. at 16a).

[17] *Hoots V*, (3d Cir. Feb. 25, 1981) (order denying petition for rehearing) (App. 53a).

tutional rights of litigants by imposing a deadline within which all evidence must be concluded, all issues finally determined and relief granted. While the circuit court seizes upon an historically lengthy desegregation case in apparent justification for its mandate, it does so without recognition that precedent is being set for all other cases which are now or will be before the federal judiciary. As Judge Garth clearly points out in his dissenting opinion, the imposition of *any* deadline within which a district judge must perform his judicial functions necessarily carries with it "the seeds of great mischief and potential disruption."[18]

Upon review of the circuit court's opinion,[19] it clearly cannot go unheeded that the court of appeals has failed in its attempt to establish any proper legal precedent or authority in support of its mandate. In the first instance, nowhere does our Constitution or statutory law give the circuit court the power to command a trial judge to deal with evidentiary and discretionary matters within a specific time frame. To the contrary, the exercise of such power is not only improvident and inadvisable, but constitutionally impermissible. Such action will necessarily encourage district judges throughout the United States to limit or preclude the hearing of all relevant evidence thereby taking away from all party litigants their right to determine the best presentation of their case and further forcing the trial judge to make hasty, ill-advised and arbitrary decisions, all in violation of the litigants' constitutional rights to due process, a fair trial, and equal protection.

The circuit court distorts the constitutional, legal and practical implications of its mandate upon *all* litigants by focusing its concern solely upon the 9½ year history of this case throughout which innocent plaintiffs have been "begging for

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[18] *Hoots V* (App. at 35a).

[19] *Hoots V* (App. at 1a).

judicial relief."[20] However, would the court of appeals also require a jury of 12 men and women to assimilate all evidence in a complex criminal or personal injury case and reach an appropriate yet constitutional verdict within 90 minutes merely because the victim has "waited patiently at the courthouse door . . . without an ounce of relief?"[21] Surely the rights of the accused, whether it be a criminal defendant facing a potential loss of liberty or school districts attempting desegregation with quality education, can be of no less concern.

Certainly, no one is enthralled by the fact that over 9 years have passed and thousands of taxpayers' dollars have been spent by all municipalities to assure that all relevant evidence is before the court so that a proper and ultimate conclusion can be reached which will not only attain desegregation but also quality education. Yet, by imposing a time limitation, the circuit court is now prepared to discard nine years of progress, ignore the complicated evidentiary and legal issues which still remain, and force the implementation of an ill-advised, ill-considered and unconstitutional remedy to the irreparable injury of *all* persons involved. The circuit court's action, therefore, requires that this court, through the granting of this Petition, exercise its supervisory powers to prevent further intrusions upon the independence of the district court as the ultimate fact finder and protector of *all* litigants' rights.

In addition, although the majority would like to call our attention primarily to *Anderson v. Dougherty County Board of Education,* 609 F.2d 255 (5th Cir. 1980) in an attempt to justify its intrusion, the *Anderson* case (as well as all others cited in the majority and concurring opinions) is not only easily distinguishable but its extraordinary factual situation serves to impose an even greater burden for justification of the time

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[20] *Hoots V* (App. at 21a).

[21] *Hoots V* (App. at 23a).

limitation, to-wit, dilatory tactics on the part of the trial judge.[22] Unlike *Anderson,* we are not dealing here with a duel system. Nor is this a situation wherein the trial judge had purposefully or negligently delayed the implementation of an effective desegregation plan in accordance with this court's prior mandate. On the contrary, the trial judge here has "valiantly and ably wrestled with the complex issues of this case,"[23] as he has attempted to assist in devising a plan of quality education and desegregation which will be both workable and viable.[24]

The devastating effects this precedent-setting mandate will have on the federal judiciary, and the rights of its litigants, is not merely a whimsical prediction on the part of petitioners. For even as of the time of this writing, the "seeds of great mischief and potential disruption" have been planted. More specifically, while recognizing that the duty of formulating a realistic, practical and effective remedy rests with the district court,[25] the circuit court nevertheless insists that under no

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[22]In *Anderson,* the U.S. District Court for the Middle District of Georgia had been faced since 1963 with the desegregation of one *duel* system in Dougherty County, Georgia. In 1972 the 5th Circuit Court of Appeals held that the desegregation plan then in operation did not comply with this Court's mandate in *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), and the case was remanded to the district court to adopt a new remedy. Although new attendance zones were implemented at the secondary level, from 1972 to 1980, the district court failed to order a plan extending to the elementary level and *failed to explain why* (except to refer to opposition to desegregation in the community). As a result of the dilatory tactic, a 60-day mandate issued.

[23]*Hoots V* (App. at 16a n.25).

[24]In addition, it is important to recognize that plaintiffs, themselves, have greatly contributed to the lengthy history of litigation by at least two improvident and time consuming appeals as well as plaintiffs' abrupt change of position regarding the Tuition Plan after many months of its espousement.

[25]*Hoots V* (App. at 14a).

circumstances should the 1981 school year begin without a remedial plan in place.[26] Such an unrealistic belief can only be based upon a total misapprehension of the complexity of facts.

When the circuit court's mandate finally issued on January 26, 1981,[27] the district court had before it three remedial concepts:

(a) A "Tuition Plan" about which the court had received detailed testimony but which required further examination and refinements before implementation. For example, during the July-August, 1980 hearings, plaintiffs sought to point out that the Tuition Plan should not be limited to secondary students, while others indicated that the neighborhood school concept for elementary students would be acceptable;

(b) A four or five district merger plan about which there had been no finalized or detailed proposal presented to the court, nor had any direct evidence been received by the court; and

(c) An "Upgrade Plan" consisting of a magnet program combined with limited but mandatory comingling of students in surrounding districts. As with the merger proposal, the district court had received no finalized or detailed statement of the plan nor had it taken any evidence on the plan.

In addition, since the institution of the mandate, the plaintiffs themselves have proceeded with investigation, collection of data and the formulation of an additional new proposal known as the "HGH Associates Plan of Consolidation." Having not been submitted to the court until March 26, 1981, the plan at this writing remains totally untested and unsupported

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[26] *Hoots V* (App. at 16a).

[27] While only having to deal with a question of jurisdiction and the propriety of the trial judge's denial of immediate injunctive relief, 84 days had passed since the hearing of plaintiffs' appeal before a decision was rendered by the circuit court.

by evidence. Thus, with the refinement of one plan still to be considered, plus the final formalization of and taking of evidence on the other proposals, the district court, in attempting to meet the 90 day deadline, has no alternative but to limit the taking of evidence and to decide upon the limited information it has before it in violation of constitutional mandates.

The dilemma which has been thrust upon the trial judge can be no more clearly exemplified than by a review of the district court's recent order of April 6, 1981,[28] where "*in view of the requirement of immediate relief,*"[29] the district court is prepared to ignore constitutional mandates and

(a) summarily dismiss the upgrade plan without the taking of evidence and without even the consideration of the fully developed plan;[30]

(b) adopt the plaintiffs' HGH proposal without the hearing of any material evidence as to pupil assignment, transportation, utilization of quality facilities or other matters of implementation necessary for the proper determination of whether the remedial proposal would be effective, workable and viable;

(c) impermissibly preclude every litigant's right to full cross-examination of plaintiffs' witnesses; and

(d) unconstitutionally deny petitioners and others their right to a fair trial, due process of law and equal protection under the law by impermissibly limiting each to the presentation of only one witness.

Under these circumstances, the implementation of any such remedy without due regard for not only constitutional

[28] *Hoots v. Commonwealth of Pennsylvania*, No. 71-538 (W.D. Pa. April 6, 1981) (Memorandum Order) App. 75a.

[29] *Id.*, at 77a. (Emphasis supplied).

[30] The trial judge was fully apprised at a status conference of April 1, 1981 that additional work was in progress to make the plan acceptable in meeting the goals of desegregation and quality education.

considerations but also practical considerations of implementation, effectiveness of implementation, effectiveness in desegregation and quality of education, will result in irreparable injury to not only the petitioners herein, but also to the plaintiffs, parents and children, employees and taxpayers of all affected school districts.

In sum, a precedent has been set which can effectively lead to the complete abandonment of judicial responsibility in all federal courts. Time limitations imposed upon the orderly taking of evidence, consideration of issues and determination of relief as a result of the circuit court's unwarranted mandate, can only serve to encourage trial judges to make arbitrary, capricious and unconstitutional decisions (as has this trial judge) necessarily resulting in a cascade of appeals and further delay in the administration of justice.

II

Certiorari should be granted to resolve a conflicting question of law and thereby secure and maintain uniformity of decision among this Court and the circuit courts of appeals.

As previously outlined in the Statement of the Case,[31] the appeal out of which this Petition for Certiorari arises first came before the United States Court of Appeals for the Third Circuit upon a denial of respondents' motion for injunctive relief. On July 24, and again July 30, 1980, upon conclusion of their own testimony but prior to the hearing of any testimony by other litigants, the respondents herein requested the trial judge to summarily reject without further testimony the desegregation plan then being considered and further demanded the immediate implementation (within 31 days) of another proposal about which no formalized plan had yet been prepared, nor any testimony received. The trial judge denied the motion summarily, but *without prejudice* to renew it at the conclusion

[31] *Supra* at 3.

of evidentiary hearings.[32] By accepting jurisdiction of that appeal as a "denial of an injunction" in accordance with 28 U.S.C. §1292(a)(1), the court of appeals has totally misapprehended and overlooked the established legal precepts of this Court.

Section 1292(a)(1) has been and must continue to be viewed as a narrow exception to the policy of the final judgment rule.[33] To apply it otherwise would necessarily lead to every like refusal of a trial judge to rule as requested to be termed the "denial of an injunction." Therefore, it is important that the Court look beyond the "literal characterization of an order as an injunction"[34] in determining the issue of appealability in order to avoid lengthy piecemeal litigation.

To allow an appeal at this stage of the proceedings is in direct conflict with this court's doctrine expressed in *Cohen v. Beneficial Industrial Loan Corp.*:[35]

> The effect of the statute is to disallow appeal from any decision which is *tentative, informal or incomplete.* Appeal gives the upper court a power of review. *Not one of intervention.* So long as the matter remains open, unfinished or inconclusive there may be no intrusion by appeal. (Emphasis added)[36]

Only where the decision effects a right "separate from and collateral to rights asserted in the action" shall an appealable order exist.[37] Where, as here, plaintiffs' motion for relief

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[32] *Hoots v. Commonwealth of Pennsylvania*, 71-538 (W.D. Pa. July 30, 1980) (Order of Court) App. ii.

[33] See *Western Geophysical Co. v. Bolt Associates, Inc.*, 463 F.2d 101, 104 (2nd Cir.), *cert. den.*, 409 U.S. 1040 (1972).

[34] See *Stateside Machinery Company, Ltd. v. Alperin*, 526 F.2d 480, 482 (3d Cir. 1975).

[35] 337 U.S. 541 (1948).

[36] *Id.* at 546.

[37] *Id.* at 541.

through the immediate implementation of a desegregation plan is a central ingredient to the basic cause of action, the jurisdictional prerequisites set forth in 28 U.S.C. §1292(a)(1) are not met.

The circuit court attempts to thwart the *Cohen* guidelines by reliance upon a theory that denial of plaintiffs' motion would have "serious, perhaps irreparable consequences."[38] While such may be an appropriate test to consider under this Court's decision in *Gardner v. Westinghouse Broadcasting Co.*,[39] the circuit court has failed to recognize that appealability in such circumstances requires the satisfaction of a two-pronged test.

As outlined in *Gardner,* the lower court must first have "finally determined that an injunction would not be available."[40] Only then should the court continue to a determination as to the seriousness of the consequences arising from the denial. The July 30, 1980, motion was specifically denied *without prejudice* and could have been renewed at the conclusion of hearings. Thus, on its face, the order of the district court clearly reveals that it was never intended to nor did it *finally determine* that the requested injunction would not be available. At most, the denial was merely an attempt by the trial judge to continue to a conclusion the orderly presentation of evidence by other litigants.

The circuit court again attempts to avert the *Gardner* finality argument by asserting that "the effect of the denial was to preclude any possibility of granting the *relief sought* by appellants."[41] Such denial, the court suggested, had "serious, if not irreparable consequences for General Braddock Area School District school children who will now have to wait

[38] *Hoots V* (App. at 13a).

[39] 437 U.S. 478 (1978).

[40] *Id.*

[41] *Hoots V* (App. at 13a).

another year before enrolling in racially integrated schools."[42] Such an assertion clearly could only have been made upon a total disregard of the facts before it as well as the legal and practical considerations involved in school desegregation.

The "relief sought" by plaintiffs' July 30, 1980 motion was the immediate implementation, within 31 days, of a multi-district consolidation plan which had neither been prepared or explored by the court, nor even defined as to its geographical configuration. In addition, plaintiffs' own expert testified that the mere preparation of a merger plan alone would take at least three months.[43] Accordingly, the implementation of consolidation relief in time for the coming 1980 school year was a practical impossibility. Further, the blind implementation of any such plan as plaintiffs might suggest without full consideration and evidentiary hearings as to the cost, workability, long term viability and effect upon desegregation and quality education of any such proposal was not only doomed to failure, but would in itself result in serious, irreparable consequences falling upon the plaintiffs, as well as total and immediate destruction of four to seven school districts then providing quality education.

By circumventing the accepted rule of "finality" prescribed by this Court, the court of appeals has set a precedent in school desegregation cases which will necessarily result not only in lengthy and time consuming piecemeal litigation but also in the eventual disregard of the trial court's jurisdiction in hearing all relevant and material evidence necessary for the formulating of a realistic, practical and effective remedy — the central ingredient to all such actions.

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[42] *Id.*

[43] July 29, 1980, Transcript, *Hoots v. Commonwealth of Pennsylvania*, No. 71-538 (W.D. Pa.) p. 215.

No consideration was given in this estimate as to the time necessarily incurred by the court in taking evidence as to the effect or viability of such relief.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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